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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 218

THE P. DOUGHERTY COMPANY,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, The P. Dougherty Company, prays that a writ of certiorari be issued to review the judgment of the Court of Claims of the United States against the petitioner and in favor of the United States, entered May 2, 1949 (R. 17).

The certified transcript of the record is furnished herewith in accordance with Rule 41 of the rules of this Court.

Jurisdiction

Jurisdiction is conferred on this Court by Sec. 1255, Title 28 U. S. C. (formerly Sec. 3 (b) of the Act of February 13,

1925, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, 53 Stat. 752).

Summary Statement of the Matter Involved

The petitioner, a Maryland corporation, during the year 1942 and at times prior thereto, was engaged in towing and barge transportation, for the most part of coal from Hampton Roads or New York to Long Island and New England ports. During summers and at other times when not in use the barges were tied up in the James River.

At times herein mentioned in 1942 the petitioner owned two steel tugs and fifteen wooden barges. Seven of the barges had been acquired in 1915. The hatches on these barges were enlarged in 1941 to facilitate the unloading of coal by "diggers". The remaining eight barges had been acquired in 1921 at the cost of $90,000.00 each. They had been built as steamers in the first World War. Four of these barges had been in continuous use and needed no repairs in 1941 nor in 1942, but the other four did need repairs to cost about $35,000.00 each, under the then conditions.

One of the last-mentioned barges was in fact repaired and returned to use in 1941. Due to the cost of the repairs to the tugs and of the repairs and alterations of the other barges of about $250,000.00 the petitioner was, in 1941 and the early part of 1942, not financially able to complete the repairs to the barges *Allegany, Caroline* and *Montgomery,* but planned to do so in the fall of 1942 (R. 7). The hulls of these barges are the subject of the suit in the Court of Claims.

The War Shipping Administration of the United States Maritime Administration, for war purposes, made a survey of laid-up tonnage in United States ports and determined, from the then standpoint of economy and the scarcity of

materials, what vessels should be repaired and returned to use and what vessels should be junked and destroyed. The barges named *Allegany, Caroline* and *Montgomery* were placed on a list of vessels to be junked and destroyed (R. 7, 8, 9).

This list of vessels to be junked and destroyed was, by letter dated June 5, 1942, forwarded to the Regional Representative, Special Projects, Salvage Section, War Production Board, Baltimore, Maryland, with instructions that the vessels be junked for the metal equipment on them, which the War Shipping Administration needed for other vessels.

The regional representative in turn advised the petitioner that the War Shipping Administration had determined the barges should be scrapped for the metal on them. The petitioner tried to retain the barges, claiming they were valuable and that they should not be destroyed for the metal on them (R. 10).

The regional representative obtained and submitted to the petitioner the bid of Standard Steam Winch and Hoist Company on certain equipment and material on the barges, consisting of the anchors, bells, pumps, capstans, windlasses, winches, tanks and anchor chains on each. The offer was of $2,500.00 a barge for the equipment. The regional representative made it clear to the petitioner that, if necessary, the equipment would be requisitioned and the petitioner left with the wooden hulls, which it could not retain without the anchors, pumps and other necessary equipment.

The War Shipping Administration was anxious to obtain the anchors, chains and other equipment on the barges. This it was prepared to requisition. But the War Shipping Administration did not want the wooden hulls that it said should be junked. The hulls under no circumstances would ever have been requisitioned and paid for. The petitioner

was so told at the time. The petitioner was clearly told that the equipment would be taken and paid for and the hulls would be burnt.

The court below made correct findings of all such primary facts and also correctly found:

> Plaintiff preferred to sell the barges outright rather than the equipment alone, since it regarded the barges as worthless without the equipment, and the company did not want the added expense of destroying them or being responsible for them without such equipment (R. 12).

The petitioner was paid for the equipment in full, but was paid nothing for the hulls. The equipment was taken and used, the hulls were not taken, but junked and destroyed. The petitioner sued, not for the value of the equipment which the War Shipping Administration sought, might have requisitioned and actually paid for, but for the value of the hulls and its property therein, which was not taken into the actual possession of the United States, but was destroyed to further the prosecution of the war in transferring the equipment on them to other vessels. The court below, however, reached the erroneous conclusion that the barges themselves would have been requisitioned in the War Shipping Administration's effort to obtain the equipment. Counsel for the petitioner believes that this misunderstanding of the petitioner's suit has resulted in the holding of the court below that a claimant against the United States cannot recover unless there has been an actual taking, unto the United States itself, "of some right in the property". (R. 16.)

The same misunderstanding led the court below to state:

> The plaintiff could have awaited requisition (of the hulls) and claimed the value of the property taken. (R. 16.)

Counsel for the United States in the court below stated at page 52 of his brief:

> In this connection, it is well to note that defendant's War Shipping Administration plainly was not interested in these vessels for use. The War Production Board was not authorized to make such requisitions, which would have had to have been made under Section 902 of Merchant Marine Act of 1936, as amended.

And yet the court below held that the petitioner should have awaited the requisitioning of the hulls that the United States did not want and had no intention of ever requisitioning.

The Question Presented

The War Shipping Administration having made its determination that the three barges should not be repaired or used in time of war but should be junked for the anchors, pumps and other needed equipment on them, which anchors, pumps and other equipment was necessary to their retention by the petitioner, and the War Production Board under instructions to junk the vessels having compelled the petitioner to dispose of the equipment for resale to the War Shipping Administration, was the property of the petitioner in the wooden hulls, which were rendered useless and of no further value, taken for public use?

Stated differently, did the court below err in holding that the property of the petitioner in the hulls was not taken for public use, because the petitioner did not await the requisitioning of the hulls that the War Shipping Administration had clearly stated that it did not want and had indicated that it would not requisition but would junk and destroy? Can property be "taken for public use" by mere destruction for Government purposes, such as furthering the war effort?

Reasons for Allowance of the Writ

Preliminary Statement

The reasons for the allowance of the writ are clearly reflected in the errors of the court below. They are the holdings of the court that:

1. "• • • we do not think that steps taken measure up in the circumstances of this case to the elements of a requisitioning of property under the Fifth Amendment. As was stated in the case of *St. Regis Paper Company* v. *United States*, 110 Ct. Cls. 271, 276-7, certiorari denied 335 U. S. 815:

• • • • • • •

• • • that there must be an actual taking of some right in the property."

2. Quoting from *Vansant* v. *United States*, 75 Ct. Cls. 562, 566, "• • • there must have been an exercise, by the United States, of a proprietary right for a greater or less time, in the property taken."

3. "The plaintiff could have awaited requisition and claimed the value of the property taken."

The requirements of the court below, to permit the petitioner to recover, are, as stated by it, that the hulls should have been actually requisitioned and that they should have become the property of the United States, rather than have been destroyed.

Property Need Not Be "Requisitioned" in Order to Be "Taken"

The right of the Government to take the property of its citizens is by virtue of its sovereignty and does not arise from the Fifth Amendment. The taking to which the Fifth

Amendment has reference may be in any manner. It need not be by requisitioning alone. The right to compensation under the Fifth Amendment may arise from its mere destruction for public use.

The War Shipping Administration had not the slightest intention of requisitioning the hulls of the vessels, but merely the equipment. The petitioner was paid for the equipment and sued for the value of the hulls, which it lost in the procedure by which the equipment was acquired by the War Shipping Administration. In his brief in the court below, as above stated, counsel for the United States noted for the benefit of the court that the War Shipping Administration was not interested in the vessels themselves. The court, however, confused the taking of the equipment under threat of requisitioning with the planned destruction of the hulls and resultant loss to the petitioner.

The holding of the court below that the petitioner cannot recover, because it did not await requisitioning of things that the War Shipping Administration did not intend to requisition, denies the petitioner its right to compensation for property as guaranteed by the Fifth Amendment.

Property may be "taken" by mere destruction and without the United States acquiring any actual proprietary title therein.

The court below relied on its decision in *St. Regis Paper Company* v. *United States*, 110 Ct. Cls. 271, certiorari denied 335 U. S. 815, in holding that the Fifth Amendment requires "an actual taking of some right in the property" by the United States. The court also referred to its decision in *Vansant* v. *United States*, 75 Ct. Cls. 562.

In the *St. Regis Paper Company* case the claimant was merely required to shut down a mill for a period under a preference order with respect to pulpwood. There was

neither a taking nor a destruction. The Solicitor General opposed the granting of the writ because there was neither a taking unto the United States nor a destruction. In so doing he stated the rule that should apply here. At page 10 of his brief in opposition in the *St. Regis Paper Company* case the Solicitor General stated that the "destruction" rule applies:

> • • • when the effects of the governmental action short of acquisition of title or occupancy are so complete as to deprive the owner of all or most of his interest in the subject matter.

In this case the petitioner was deprived of all its interest in the barges when the anchors and pumps were taken. The holding of the court below is in conflict with the decision in the *St. Regis Paper Company* case and the rule stated by the Solicitor General.

In *Vansant* v. *United States*, 75 Ct. Cls. 562, suit was brought for damage to land by lowering water by removal of locks. In *United States* v. *Dickinson*, decided June 16, 1947, 331 U. S. 745, 67 S. Ct. 1382, the damage was the result of raising of the river pool level, and this Court found that property was taken. Counsel submits that the decisions are in direct conflict, unless it can be found that there is material distinction between injury by raising the water level and by lowering it.

This Court in the *Dickinson* case did not cite the *Vansant* case, but in direct refutation of the holding therein, Mr. Justice Frankfurter stated:

> If the resulting erosion which, as a practical matter, constituted part of the taking was in fact preventable by prudent measures, the cost of that prevention is a proper basis for determining the damage, as the court below held.

The *Vansant* rule is not, or should not be, the present law. This Court in *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390, clearly departed from it in holding that Governmental action short of the acquisition of title, if its effect is to deprive the owner of his interest in the property, amounts to a taking.

Of such as the *Vansant* decision it is stated in *United States* v. *4,105 Acres of Land, etc.*, decided July 10, 1946, N. D. Cal., 68 F. Supp. 279, citing the *General Motors Corporation* case:

> The power of the court to award compensation for the actual taking, is not limited to what is sought in this proceeding to be taken.
>
> • • • • • • •
>
> In passing, it should be noted that the scope of intangible rights compensable in condemnation proceedings is being steadily broadened in decisions of the Supreme Court.

The Question Is One of Importance

In *United States* v. *Dickinson*, 331 U. S. 745, 67 S. Ct. 1382, a similar question was involved and this Court stated the writ was granted because of the importance of the questions presented. In *United States* v. *General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390, the matter of taking by destruction was considered of importance.

The petitioner submits, that the violation of its rights under the Fifth Amendment is, in itself, a matter of importance to all citizens.

The Court of Claims having chosen to follow its previous decision in *Vansant* v. *United States*, 75 Ct. Cls. 562, which is in direct conflict with the *Dickinson* and *General Motors*

Corporation decisions in this Court and with decisions of the several Circuit Courts of Appeals, which need not be cited, the petitioner submits that the writ should be granted.

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